No. 80-926

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN HEDMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury with regard to the meaning of extortion "under color of official right" under the Hobbs Act, 18 U.S.C. 1951.

2. Whether the trial court correctly instructed the jury with regard to the elements of the tax law violations alleged in the indictment.

3. Whether the trial court properly denied petitioner Karnick's motion for a severance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 630 F. 2d 1184.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1980. A petition for rehearing was denied on October 30, 1980. The petition for a writ of certiorari was filed on December 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to commit extortion through the wrongful use of their positions as supervisors for the City of Chicago, in violation of 18 U.S.C. 1951. In addition, petitioner Hedman was convicted on five counts of extortion "under color of official right," in violation of 18 U.S.C. 1951, and two counts of failure to report income received in 1973 and 1974 on his federal income tax returns, in violation of 26 U.S.C. 7206(1). Similarly, petitioner Jercich was convicted on three counts of official extortion and two counts of income tax fraud, and petitioner Larsen was convicted on two counts of official extortion and two counts of income tax fraud. Petitioner Karnick was convicted on one count of extortion. Petitioners Hedman, Larsen and Jercich were sentenced to a term of one year's imprisonment, three years' probation, and a $1,000 fine. Petitioner Karnick was sentenced to a one-year work-release program, three years' probation, and a $1,000 fine. The court of appeals affirmed (Pet. App. A).

From 1968 until 1976, petitioners received illegal payoffs from various construction companies whose projects did not meet building code standards. In return, petitioners knowingly allowed the building to be constructed without a

required building permit or on the basis of a fraudulently obtained permit. For example, since 1959 the Danley Lumber Company constructed a substantial number of garages in Chicago that violated the building code. In lieu of complying with the code and obtaining a proper permit, the president of Danley would deliver cash and slips noting the address of the nonconforming project to petitioners at either their homes or their offices at City Hall. On occasion, one petitioner received an envelope designated for delivery to another petitioner. Likewise, various other companies made numerous payoffs to one or more of the petitioners in order to construct buildings without complying with the code and permit regulations that were petitioners' duty to enforce (Pet. App. 6-10). In addition, the evidence showed that petitioners Hedman, Jercich, and Larsen failed to report the payoffs received from the various companies as income on their 1973 and 1974 tax returns (*id.* at 10).

ARGUMENT

1. Petitioners contend (Pet. 15-26) that the district court improperly instructed the jurors with regard to the extortion element of a Hobbs Act prosecution for taking money "under color of official right." See 18 U.S.C. 1951. Petitioners argue that the Hobbs Act requires proof that the corrupt official initiated or expressly induced the extortionate payment, and that extortion under the Hobbs Act and bribery are mutually exclusive crimes. As the court of appeals correctly concluded, however (Pet. App. 18-19, quoting *United States* v. *Braasch*, 505 F. 2d 139, 151 (7th Cir. 1974)), it is well settled that

> [t]he use of office to obtain payments is the crux of the statutory requirement of "under color of official right," and [petitioners'] wrongful use of official power was obviously the basis of this extortion. * * * It matters not whether the public official induces payments to perform his duties or not to perform his duties * * *.

> So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.

This construction of the Hobbs Act is consistent with the plain meaning and history of the statute (see, *e.g.*, *United States* v. *French*, 628 F. 2d 1069, 1072-1074 (8th Cir. 1980), cert. denied, No. 80-479 (Nov. 3, 1980); *United States* v. *Harding*, 563 F. 2d 299, 304 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Trotta*, 525 F. 2d 1096, 1099-1100 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976)),[1] and has been adopted by each of the ten courts of appeals that have considered this issue (see, *e.g.*, Pet. App. 17-19; *United States* v. *French*, *supra*; *United States* v. *Williams*, 621 F. 2d 123, 124 (5th Cir. 1980) (collecting cases); *United States* v. *Grande*, 620 F. 2d 1026, 1031 (4th Cir. 1980); *United States* v. *Butler*, 618 F. 2d 411, 417-420 (6th Cir. 1980), cert. denied, No. 79-6479 (June 16, 1980); *United States* v. *Cerilli*, 603 F. 2d 415, 425-426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Phillips*, 577 F. 2d 495, 503 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *United States* v. *Hall*, 536 F. 2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F. 2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Trotta*, *supra*). And for the same reasons that this Court has repeatedly declined to

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[1] Notwithstanding petitioners' claims to the contrary (Pet. 20-23), the most natural construction of the Hobbs Act as applied to official extortion requires the government to prove "the obtaining of property from another, with his consent, * * * under color of official right" (18 U.S.C. 1951(b)(2)). Moreover, official extortion at common law included both "demanding" money and "taking" money if the defendant was a public official. See, *e.g.*, *United States* v. *French*, *supra*, 628 F. 2d at 1072-1074; *United States* v. *Laudani*, 134 F. 2d 847, 851 n. 1 (3d Cir. 1943).

review the Hobbs Act convictions in those cases (see, *e.g.*, *Butler* v. *United States*, No. 79-6479 (June 16, 1980); *French* v. *United States*, No. 80-479 (Nov. 3, 1980); *Cerilli* v. *United States*, 444 U.S. 1043 (1980); *Trotta* v. *United States*, 425 U.S. 971 (1976); *Mazzei* v. *United States*, 423 U.S. 1014 (1975); *Braasch* v. *United States*, 421 U.S. 910 (1975)), so too further review of petitioners' contentions regarding the Hobbs Act is unwarranted here.[2]

2. Petitioners Hedman, Jercich, and Larsen also challenge (Pet. 26-29) the trial court's instructions to the jury regarding the income tax charges against them under 26 U.S.C. 7206(1). Citing 26 U.S.C. 6501, petitioners argue that the court should have told the jurors that the government had to prove a "substantial" understatement of income in each year in excess of 25% of the actual income received in that year. But, as the court of appeals pointed out (Pet. App. 22), Section 6501 is a civil tax provision

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[2]Petitioners erroneously suggest (Pet. 16-19, 24-25) that there is a conflict among the courts of appeals on these issues. The decisions cited above squarely refute this claim. We further note that, with one possible exception, the cases cited by petitioners are in accord with the cases cited above in recognizing that bribery and extortion are not mutually exclusive and that a public official violates the Hobbs Act by wrongfully taking money paid on account of his position whether or not he actively seeks the payoff. See *United States* v. *Wright*, 588 F. 2d 31, 35 n.2 (2d Cir. 1978) (citing with approval *United States* v. *Trotta*, *supra*); *United States* v. *Shelton*, 573 F. 2d 917, 920 (6th Cir. 1978); *United States* v. *Adcock*, 558 F. 2d 397, 403 (8th Cir. 1977); *United States* v. *Hyde*, 448 F. 2d 815, 832-833 (5th Cir. 1971). In *United States* v. *Addonizio*, 451 F. 2d 49, 72-73 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972), the court of appeals arguably indicated that extortion under the Act and bribery may be distinct crimes. Subsequently, however, the Third Circuit has rejected this reading of the *Addonizio* decision and has repeatedly concluded that "where extortion under color of official right is charged, one need not prove that the payment was obtained by force, fear or duress." *United States* v. *Cerilli*, *supra*, 603 F. 2d at 425. See, *e.g.*, *United States* v. *Mazzei*, 521 F. 2d 639, 643-645 (3d Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *Kenny*, 462 F. 2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914 (1972).

concerning the applicable statute of limitations in certain civil proceedings and has no relevance at all to a criminal prosecution under 26 U.S.C. 7206(1). And Section 7206(1) proscribes any willful, material misstatement in a tax return, regardless of its magnitude. Thus, materiality and not "substantiality" is the prescribed element of the crime for which petitioners were charged and convicted.

Petitioners correctly note that the indictment alleged that petitioners believed that their actual income was "substantially" in excess of their reported income. Even assuming that petitioners were entitled to a charge reflecting this surplusage in the indictment (but cf. *Berger* v. *United States,* 295 U.S. 78, 81-82 (1935)), the district court in fact instructed the jurors that "each of the tax counts alleges that the particular defendant received *substantial* other income in addition to the total income reported on the return" and that the government must "prove[] beyond a reasonable doubt that the defendant had income *substantially* in excess of the total income he reported on his return" (Pet. App. 21 n.6).[3] In short, the indictment and trial court's charge

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[3]The court charged the jurors as follows (Pet. App. 21 n.6; Tr. 1572-1573):

> To convict a defendant [of making false statements on a federal income tax return] the government must prove each of the following three elements beyond a reasonable doubt:
>
> 1. the willful making and subscribing of a return filed with the Internal Revenue Service that was incorrect as to a material matter;
>
> 2. that the return contained a written declaration that it was made under the penalty of perjury; and
>
> 3. that the defendant did not believe the return to be true and correct as to the material matter charged in the indictment.
>
> The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not

regarding the tax counts were more favorable to petitioners than required by Section 7206(1). Accordingly, petitioners have no cause to complain. Cf. *Heisler* v. *United States*, 394 F. 2d 692, 695-696 (9th Cir. 1968).

3. Finally, petitioner Karnick contends (Pet. 29-40) that his joinder with the other petitioners was improper under Fed. R. Crim. P. 8 and that the trial court should have granted his motion for a severance under Fed. R. Crim. P. 14. At the outset, we note that petitioner failed to challenge the joinder prior to trial and therefore waived any objection on this ground. See Fed. R. Crim. P. 12(b) & (f); *United States* v. *Papadakis*, 510 F. 2d 287, 299-300 (2d Cir.), cert. denied, 421 U.S. 950 (1975). In any event, Rule 8 provides that joinder of two or more defendants is proper "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Here, petitioner Karnick was charged and convicted of conspiring with his co-defendants to extort money. In addition, the substantive extortion offense with which he was charged was closely connected in time, place, occasion and manner with the other substantive offenses asserted against his fellow employees. Accordingly, joinder was proper. See, *e.g.*, *United States* v. *Santoni*, 585 F. 2d 667, 673 (4th Cir. 1978), cert. denied, 440

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necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return.

The false statement alleged in each of the tax counts is that the total income reported on the return involved did not contain substantial other income purportedly received by the particular defendant. The Court instructs you that a statement of total income on a tax return is material as a matter of law.

U.S. 910 (1979); *United States* v. *Patterson*, 455 F. 2d 264, 266 (9th Cir. 1972); *United States* v. *Daddano*, 432 F. 2d 1119, 1125 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971).[4]

Likewise, there is no merit to petitioner Karnick's claim that the denial of his severance motion deprived him of a fair trial. It is well settled that the trial court has broad discretion to grant or deny a severance, and its decision will not be reversed unless there is a clear abuse of discretion. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *Schaffer* v. *United States*, 362 U.S. 511 (1960); *United States* v. *Adams*, 581 F. 2d 193, 198 (9th Cir.), cert. denied, 439 U.S. 1006 (1978). Moreover, the mere presence of hostility among, or disparity of evidence against, the defendants is insufficient ground to require a separate trial. See, *e.g.*, *United States* v. *Grabiec*, 563 F. 2d 313, 319 (7th Cir. 1977); *United States* v. *Ehrlichman*, 546 F. 2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977); *United States* v. *Barber*, 442 F. 2d 517, 530 (3d Cir.), cert. denied, 404 U.S. 958 (1971). Rather, a defendant is entitled to a severance only if he makes a compelling showing of substantial prejudice. See, *e.g.*, *United States* v. *Crawford*, 581 F. 2d 489, 491 (5th Cir. 1978); *United States* v. *Cella*, 568 F. 2d 1266, 1288 (9th Cir. 1977); *United States* v. *Di Giovanni*, 544 F. 2d 642, 644 (2d Cir. 1976); Fed. R. Crim. P. 14.

Here, the courts below properly concluded (Pet. App. 29-31) that the possibility of prejudice was far outweighed by "the need to conserve judicial resources and to avoid further crowding of federal trial calendars with a succession of factually related actions." *United States* v. *McDonald*,

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[4]In *United States* v. *Nettles*, 570 F. 2d 547 (5th Cir. 1978), and *United States* v. *Gentile*, 495 F. 2d 626 (5th Cir. 1974), on which petitioner Karnick relies (Pet. 33-34), the evidence failed to show any common scheme, plan or association among the defendants.

576 F. 2d 1350, 1355 (9th Cir.), cert. denied, 439 U.S. 830 (1978). The charges against petitioner Karnick were substantially related to the counts against his co-defendants. Moreover, the evidence against Karnick was strong and convincing, and the trial judge carefully and repeatedly instructed the jurors to consider separately the evidence introduced on each count and against each defendant (Pet. App. 31). In addition, petitioner Karnick identifies no irreconcilable conflict among the defenses proffered at trial. In these circumstances, the district court correctly denied petitioner Karnick's motion for a severance. See, *e.g., United States* v. *Boyd,* 595 F. 2d 120, 125 (3d Cir. 1978); *United States* v. *Avarello,* 592 F. 2d 1339, 1346 & n.10 (5th Cir.), cert. denied, 444 U.S. 844 (1979); *United States* v. *Fuel,* 583 F. 2d 978, 988 (8th Cir. 1978), cert. denied, 439 U.S. 1127 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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